Office-Supreme Court, U.S.
FILED
JUN 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2101

Supreme Court of the United States

October Term 1980

Eugene Johnson III, Petitioner

v.

J.O.L. II, Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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June 8, 1981

QUESTIONS PRESENTED

1. May a statute constitutionally authorize an adoption over the objection of a natural parent on the ground that the parent's non-consent is found to be "contrary to the best interests of the child", whether the statute is viewed facially or as applied to a divorced parent granted visitation rights, where there is no parental abandonment, abuse or unfitness.

2. Whether divorced parents who have visitation but not custody rights per se, may be properly treated by lesser constitutional standards and reasons than those who are not divorced, such that the establishing of greater security in the stepparent unit or the avoidance of conflicts arising from visitation orders, would be constitutionally sufficient reasons for the state

to grant the permanent severance of the relationship between the natural parent and his children through its adoption statutes.

3. Whether the lack of any specific substantive, procedural and evidentiary standards for the interpretation of an adoption statute that allows the permanent severance of the parent-child relationship solely on a basis of what is stated to be the "best interests" of the children, is constitutionally permissible as a matter of notice and substantive right.

4. Whether following this Court's grant of certiorari to review the foregoing questions, and its vacating of the judgment and remand without reaching these issues, the subsequent failure of the appellate court below to modify its prior statutory interpretation or decisional law or eradicate their effects, warrants the granting of the Petition.

LISTING OF PARTIES

The petitioner is the natural parent, Eugene Johnson III. As a result of the adoption decision, the names of the respondent stepparent, here called J.O.L. III or John, and the former wife D.W.L. or Deborah are separately filed in view of existing orders.

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No._____

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On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Eugene Johnson respectfully prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered on March 10, 1981 which resulted from this Court's ruling of November 17, 1980 in No. 80-45, Eugene Johnson III v. J.O.L. II, ___ U.S. ___, 101 S.Ct. 523 (1980) remanding

the cause to that Court. The grounds and bases of the Petition hereafter appear.

OPINIONS BELOW

On October 6, 1980 in Johnson v. J.O.L. II, ___ U.S. ___, 101 S.Ct. 69 (1980), known in this Court as No. 80-45, which sought review of the decision of District of Columbia Court of Appeals in the cause known as "Petition of J.O.L. II," 409 A.2d 1073 (1979), this Court granted the Petition for Writ of Certiorari (Petition Appendix 1).

On November 17, 1980 following a Motion to Dismiss for alleged mootness, in that the Respondent said he would consent to vacating the adoption order, this Court remanded the cause for further proceedings, without deciding the questions presented, by its later order in Johnson v. J.O.L. II, ___U.S.___, 101 S.Ct. 523 (1980) (set forth at Petition Appendix, page 1).

By an en banc Order entered the same date, December 16, 1980, the D.C. Court of Appeals directed the parties to file memoranda "on the remand issue" by January 5, 1981 (Docket Entry, App. 4).

On February 9, 1981, ostensibly acting in part on a Motion to Remand by Respondent and its Opposition, and noting the Suggestion for Rehearing En Banc filed by Petitioner, the D.C. Court of Appeals en banc directed that the cause be remanded to the lower court "with instructions to vacate the adoption decree" (App. 5). No oral argument was held.

Acting sua sponte on March 10, 1981, the court en banc then vacated that direction to the lower court (App. 6). On the same date, the original panel of three judges that heard and decided the cause, taking no action on the pending decisional law in the District or its interpretation and issuing no order as to the inapplicability of the statute to the Petitioner herein, remanded

the cause to the lower court "for such further proceedings as the circumstances of this case deem appropriate." (App. 7). No action has occurred since. This Petition is from these actions since this Court's remand. The decision of the trial court appears at App. 8-20. The original Court of Appeals decision is at App. 21-27.

JURISDICTION

The order of the District of Columbia Court of Appeals was entered on March 10, 1981 and the mandate issued in that court on April 1, 1981 (App. 3,7).

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3) in the light of this Court's rulings in Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) and Key v. Doyle, 434 U.S. 59, 98 S.Ct. 280, 54 L.Ed.2d 238 (1977).

In view of the action on October 6, 1980 by this Court in Eugene Johnson III v.

J.O.L. II, ___ U.S. ___, 101 S.Ct. 69 (1980) granting the Petition for the Writ, to decide the first three questions presented, but which have not been decided either by this case or its tandem cause of Doe v. Delaware, No. 79-5932, dismissed on March 9, 1981, it is further submitted that this Court may concurrently treat the petition as a request for reinstatement of No. 80-45. See Doe v. Delaware, 49 U.S.L.W. 4250 (March 10, 1981, decided March 9, 1981).*/

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fifth, and Ninth Amendments and to the extent analogous, the Fourteenth Amendment of the Constitution of the United States, all set forth in the Appendix to this Petition (App. 28).

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*/ Doe would not have decided our issues in any event but was related to it. Recently, this Court granted certiorari to hear the evidentiary test issue in Doe. See Santosky v. Kramer, No. 80-5889, 49 U.S.L.W. 3733 (March 31, 1981).

The critical statutory provisions are set forth in D.C. Code 1973, Title 16 ¶ 304(a) through (f). The entire Code provision is set forth in the Appendix to this Petition (App. 29-30).

Particular attention, however, is called to Title 16-304(d) and 304(e). Title 16-304 of the D.C. Code provides in part (a) what is required; in part (b) when consents are necessary; and for pertinent portions here, namely subsections 304(d) and 304(e) which authorize an adoption where consents are not obtained in certain circumstances. They read as follows:

304(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

304(e) The court may grant a petition for adoption without any of the consents specified in this section when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

STATEMENT OF THE CASE

Since this Court has already granted the Petition for Writ of Certiorari in No. 80-45 to review the first three questions presented; and since, for convenience, we have separately submitted nine copies of the prior Petition, we think it unnecessary, other than for purposes of a convenient summary of the facts and to show their relation to what happened after the grant in No. 80-45, to do no more than summarize some of the facts appearing in that statement of the case on which the prior Petition was granted. In view of the probable need to underscore some of these facts, however, as they relate to this Court's remand, some detail is essential.

This action began with a Petition for Adoption of the two natural children of this Petitioner, Eugene Johnson , filed on March 31, 1977 by a step-father who married the natural mother upon her divorce from the natural father. The two children are Judith

and Elliott, who were 13 and 11 at the time.

The Petition by stepfather John (J.O.L. II) for the adoption of Judith and Elliott rested its grounds on 16 D.C. Code, 1973 Edition, Sec. 304(d) based on an alleged abandonment, and Sec. 304(e) based on an alleged "best interests" standard. Eugene (E.J. III) objected and answered at length (R. 6-14).

The critical ultimate and actual "historical" findings are of course in the Trial Court's opinion (App. 8-20).

For the purpose here, it is clear from the found facts rejecting abandonment, and from the absence of any finding of abuse, that Eugene had his children adopted from him in this case primarily because he exercised visitation rights the mother promised him in 1968 at the time of the divorce, which he went to court to obtain in 1971 and 1972, and which he never had thereafter.

The found facts indisputably reflect that the children involved in this proceeding

following the example or directions given them, refused to go on visitations; resisted visitations; stated that they did not care about their natural father, and neither wanted to see him, nor would see him; and in general, whether derived from either the natural mother or stepfather and their own misperceptions, so acted as to create the very conditions which resulted in the litigation, delays and ultimate decree (App. 10-13; 18-20).

The only found basis of the "adoption," in short, rests upon what the Trial Court's Memorandum Opinion conceded was at the heart of the problem: "the considerable resistance" to Eugene's exercise of his natural visitation rights; the fact that the children "would create a ruckus" and "refuse to accompany him anywhere", the "times" he was "insulted" and, in the end, how the court accepted that fact as likely to continue, and so decided to resolve that condition by severing the relationship permanently based on a "best interests" standard (App. 19-20; R. 205-208).

Those found facts also directly relate to good faith and the issues of continuing impact or effect, even if the adoption Order is vacated. A declaration that both the Order and statute are unconstitutional was sought and is now sought for future claims.

The trial court stated that it was "in sympathy with the pain" that permanent severance would cause Eugene (App. 18; R. 205). It acknowledged and conceded that Eugene's visits "from the time of his divorce until the last visit in 1972 (were) often against the desire of (the children's) mother and petitioner (John)" (App. 14; R. 201, emphasis added). Its findings acknowledged and conceded that to exercise his rights, Eugene "continually sought legal recourse" (App. 14; R. 201), and although he received the legal right, it was, in fact, what went on when it was exercised (the ruckus, the resistance, the insults) that induced him to cease pressing for the right; and, as the court acknowledged and found, "at the expense of much personal

pain (Eugene) decided to discontinue his visits with the hope that when the children were older, they would recognize the affection he felt for them and understand that he was a legitimate part of their lives" (App. 11; R. 198). These findings also affect good faith issues.

The court not only found these facts, it found more. It even found that it was Eugene's very "continued interest in his children which precipitated the (adoption) action" itself (App. 14; R. 201). It, of course, found no abandonment at all even though visitation stopped after the last ruckus in 1972 (App. 14; R. 201). It found that throughout the natural father's actions--- even in stopping his visitations with his children because of the "adverse emotional effect" they had (App. 18, R. 205), and the "emotional disturbance" those visitations caused (App. 20; R. 206) --- were all "motivated by parental love and concern rather than dereliction of duty" (App. 15-16;

R. 203). It is to these ultimate and found "historical" facts that the "constitutional" facts, standards and principles must apply.*/

The Court of Appeals' Opinion used a term never found in fact below --- that these visitations caused "extreme emotional stress". That fact aside, it is clear from even its extensions of the findings that there was no claim that the children were in actual therapy or in need of it, that they were being treated or that there was anything Eugene did that affected the children other than exercise his settlement divorce and court-ordered visitation rights.

The cause and reason for the cessation of visits is undisputed. After Eugene's hospitalization in 1967 and during the period awaiting divorce and thereafter, Deborah (the natural mother, D.W.L.) insisted there be no

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*/ It is also to them that the issues of "mootness" must be directed in view of the unilateral consent to vacating the Order by respondent after the pendency of the case for 3-1/2 years. The Court of Appeals, ruling on our issues and relying on prior law, found the statute and order procedurally and substantively constitutional (App. 23-27).

visitations unless a third person be present. That third person was the stepfather who married Deborah. All parties agreed that Eugene objected to that demand and therefore saved some money to go to court for another Order. The need of the father to go to court to obtain a Court Order to get anything; the willingness of Deborah to do anything to prevent him from seeing the children; his agreement pending final hearing to a third party's presence if it were not the stepfather; and the final Order that no third person was to be present were the background circumstances that led, finally, to his ceasing to visit until the ruckuses would stop and the children were of age to accept him.

There was considerable evidence of different life-styles arising from the wealth of the mother and stepfather, and the modest circumstances of the natural father (W.Tr. 40,

T.Tr. 22).*/

Even accepting all of the extensions of the findings by the appellate ruling (since vacated, while the Trial Court ruling and findings remain), the issue was not the legal sufficiency for the court to find adverse emotional effects from the visitations, but the constitutional sufficiency of those facts; and whether the Order was constitutional.

There was no doubt, as in many visitation cases, that there was stress; and no doubt the children stated that they preferred the stepparent unit. They each recognized, however, as the son said, if adoption were not granted and "if we lost, it wouldn't change my life" (F.Tr. 247-248); that "the big advantage of the adoption would be to keep Gene (the father) from coming around"

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*/ The tenor of the findings recognized the differences in life styles between the natural parents (the father was not only forced to pick up the children at the servant's entrance, T.Tr. 102-3, but he decided to go to court the third time because as the Trial Court noted, he felt his children were in a "sheltered cocoon." App. 19, and Answer). (W., T., F., referred to the date of the week of the transcript).

and "sort of declare (us) legally (a family)" (F.Tr. 248). As the daughter said, it would mean that they would not be "hassled" as she was on her birthday "which made me upset . . . got some roses that said 'from your loving father, or 'dad' or something like that. And, we wouldn't have to bother with any of those. And no phone calls or visits or anything like that ... it was sort of bothersome .... It just made me upset." (F.Tr. 236, 238).

The idea of a lesser alternative such as counselling or something short of permanent severance was ignored or rejected at all levels --- psychiatrically and in the Opinions below in the Court of Appeals and the Trial Court. It is clear from the facts, including the mother's admissions, that whatever had to be done by way of litigation or delay would be done to stop Eugene from having either a right to or any actual contact with these children.

Our summary of pertinent Opinions, supra, covers what occurred since the Order of Remand in this Court (App. 1.).

This Court's Order, referring the matter back to the D.C. Court of Appeals, did not act on the mootness issue as such, raised in the pleadings. It left the matter to that court (App. 1.).

The Court of Appeals Opinions at issue (App. 5-7) did nothing regarding the already-existing law, both as to the statute, and in the earlier case law interpreting it as constitutional; nor did they do what was primarily sought --- a declaration of the unconstitutionality of the statute or any adoption Order, including the existing one, based on a "best interests" standard. Thus, the prior rulings, and law, still binding on the Trial Court, were left standing, and the declaratory aspect of the case passed over.

Nowhere after remand did the respondents either offer to confess error or commit themselves to acts that in the words of the 1979

decision of County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), would or might have "completely and irrevocably eradicated" the effects of the prior action.

They have not agreed to any visitation as the Memoranda below showed, nor therefore to any compensatory time for the constitutional violation; nor did they even take one step in the Trial Court to this very date, or since the March 10 Order to do anything, although the Motion was theirs.

They have thereby confirmed the evidence of lack of good faith charged in Petitioner's responses and papers, here and below. These facts form the basis of the record to support the contention why these questions, not decided earlier, nor by Doe v. Delaware, nor any other case, should be heard; why they are not moot; why the writ should be granted now or No. 80-45 reinstated; and how the Court of Appeals did nothing to eradicate the ongoing effect.

REASONS FOR ALLOWANCE OF THE WRIT

1. This case involves common "best interests" statutes and decisional law on important constitutional rights; and the rulings on remand after the prior grant of the Petition to hear those questions, have not altered the law nor eradicated its effects nor entered the non-moot declaratory relief.

In our prior Petition we noted that, statistically, for every three or less marriages, there will be one divorce obtained; that in 1970 there were roughly 2,158,000 reported marriages and 708,000 divorces; but by 1977, with a much larger population, marriages increased only 20,000 while divorces exceeded 1,090,000 with the trend thereafter continuing in that proportion. See the World Almanac and Book of Facts 1980, by Newspaper Enterprise Association, Grosset & Dunlap Edition, pp. 951-952, 964.

Of that yearly number, a significant percentage affect not only the parents but the children of those divorces.

We noted that this Petition is about intrusion of the "State" --- here the District of Columbia --- into the relation of a divorced natural parent with his natural children, and its authorization through its adoption statutes of the permanent severing of that relation where there was no abandonment, abuse or unfitness on his part and no compelling necessity to grant the draconian relief of adoption for the alleged avoidance of stress over visitations and contacts with a natural father.

We urge that the scope, breadth and important issues of federal law at issue were sufficiently self-evident for this Court to grant the Petition in No. 80-45.

Since the issues were not decided here, nor properly addressed below; since the matter is capable of repetition and the effects not either eradicated or even capable of being irrevocably eradicated; since Doe v. Delaware did not resolve them; since the need for declaratory relief as to the un-

constitutionality of the statutes and order is necessary and "live"; since these are issues that few cases, if any, could raise so clearly on such a plain record, they should be heard here.

In short, the scope and breadth of the common "best interests" statutes and the still-existing decisional law in this cause, so similar to that elsewhere, is still undecided.

In this regard, we recognize that the primary reason not to hear the cause may be a claim of mootness.

We therefore address it now.

It will be noted that in the original appellate decision at bar, the entire constitutional case rested on two decisions, In the Matter of Petition for Adoption of J.S.R., D.C.App., 374 A.2d 860 (1977) declaring the act at issue here constitutional, and Petition of Douglas, D.C.App., 390 A.2d 1 (1978) applying a clearly erroneous evi-

dentiary test. See Petition of J.O.L., 409 A.2d 1073, 1074-6 (1979), set forth in the Petition Appendix at App. 21. References to J.S.R. at App. 23-26, and Douglas at App. 22 show how it rested on prior law.

Nothing in the decisions below declares that J.S.R. is no longer the law, that the statutes are unconstitutional, or that the original order is invalid (App. 5-7).

It may be urged that since Respondent consents to the vacating of the decree there is no more relief to be given.

It will be noted that as matters now stand the Trial Court is still bound by J.S.R.; under United States v. W. T. Grant, 345 U.S. 629 (1953), if the matter is capable of repetition, it is not moot; the movant has the heavy burden of persuasion; and voluntary cessation of the conduct does not make the case moot. Nor is that all.

No case, Weinstein v. Bradford*/ included, has had facts where the litigant

*/ 423 U.S. 147, 149 (1975).

picks the time to consent and himself renders the decision too short for full appellate review of its constitutional questions by a last minute consent.*/

The later decision of County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) is especially appropriate because it takes part one of Weinstein and adds that mootness and abated jurisdiction will only arise if "interim relief or events have completely and irrevocably eradicated the effects" of the constitutional wrong. (440 U.S. at 631). That has not occurred here.**/

First is the utter failure of the D.C. Court of Appeals to declare anything about the statute or the prior order or to address the bad faith claims.

Second is the continuing loss that cannot be made up meaningfully.

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*/ See Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) which limits Weinstein by referring to its provision about short duration orders to refer not merely to trial but "plenary review in this Court" 427 U.S. at 547. By himself waiting for argument for a voluntary consent, the party can always avoid "plenary review in this Court"; hence, such action is to be deemed within Weinstein exceptions or Weinstein does not address it.

**/ Davis does not even cite Weinstein.

Third is the long continuing delay.

Fourth, J.S.R.'s declaration of the statute's constitutionality is still in effect and binding on the lower court. In addition, the respondents have refused to confess error. Thus when the issue of visitation arises, and even assuming the adoption order is vacated at some time (the claims of bad faith aside), the manner in which this long period of lost relationship must be viewed and addressed --- whether as a constitutional wrong to be redressed as such, or simply a quitting by respondent --- is a continuing uneradicated effect that is "live" and needs declaratory determination at the appellate level or this level. If it is an unconstitutional deprivation as we have urged, then the right to strong correctives and the right to "make-up" is precisely that, an important loss of a right still unadjudicated, whatever the order at the trial level.

If on the other hand it was not that kind of deprivation, then the only issue is not one of a right, but some discretionary appeal to the lower court.

Bearing in mind that the setting aside of the adoption order, even at respondents' behest, warrants other relief, the issue is whether that relief is thus a matter of right or discretion.

It is analogous to the difference between a "nol pros" offered at the last minute and a legal ruling as to unconstitutionality or a finding of not guilty, each of which may serve as a different basis for future effects than may a nol pros. Indeed, this is more severe because of the continuing lost relationship while the children approach majority.

In short, if the statute had been changed; if the D.C. Court of Appeals had heard argument, issued a ruling and overruled J.S.R. and Douglas or otherwise

declared the inapplicability of the law and the invalidity of the prior order to Mr. Johnson now or in the future; if it considered our points and articulated an appellate ruling that allowed the lower Court to avoid J.S.R. or grant Mr. Johnson other relief as a matter of special remedy for a claimed constitutional infringement, it could be arguably urged that the heavy burden to show mootness under the tests in W. T. Grant or County of Los Angeles v. Davis has been met (although the issue of good faith involving the past historically-supported acts of bad faith, would still require consideration). It did not occur, however.

Particularly since every day is a loss in the relationship, and while a short-term loss may not rise to a constitutional deprivation (Cf. Baker v. McCollan, 443 U.S. 137 (1979) in another context), the long-term one here and the unilateral nature of the attempt

at the last minute are pertinent to the basis for further claims by this Petitioner.

Respondents have used the District of Columbia statute and its courts.

The effects remain; the threat of repetition, especially given the past, remains. No statute is changed; no case law has been changed; the children grow older and with 4 years now lost, more delay will end up with the children reaching majority while the issue of unconstitutional wrongs and irrevocably lost time in the relationship, proceeds in court. Even if the Order is vacated one day and respondents one day begin to move (presumably as slowly as they can so that the age of majority is closer at hand), the test for the remedy and the effects on what will follow, are not resolved, have not been eradicated, and will not be finally adjudicated.

Interestingly, the very panel that issued the March 10 Order and the original

Opinion, since vacated, recently cited J.S.R. with approval in a March 11, 1981 Opinion. See In the Matter of B.K., No. 80-252, D.C.App., set forth in the Appendix to this Petition, App. 31-38, holding that a clear and convincing evidence test or standard is not constitutionally required.

With no full eradication of effects now, nor any contemplated by the rulings below, nor even a ruling that may be used to address the declaratory relief involved in further claims, the Court of Appeals has preserved the effects to this day (App. 5-7).

This brings us to the reasons that persuaded this Court to hear the matter the first time.

While, in other contexts, decisions of this Court have addressed some of the issues that are related to the specific questions on this Petition, none has directly dealt with the important procedural and substantive rights of divorced parents.

It is a point noted in our original Petition which remains true to this day.

Certainly dicta, assumptions or reservations in the past decade of cases in this area have implied that: (a) a "best interests" standard in a state or parental termination statute cannot be constitutionally used to cause the "breakup of a natural family." See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-863 (1977)(Stewart, J., concurring in judgment), cited with approval in Quilloin v. Walcott, 434 U.S. 246, 255 (1978); (b) Smith itself clearly appears to recognize the importance of the "biological" relation and, while not excluding foster parents as "family" also seems to indicate that the "controversial" "psychological parent" theory is not per se a sufficient constitutional basis for eliminating the fundamental parent-child relationship summarized in Stanley v. Illinois, 405 U.S. 645 (1972). See Smith, 431 U.S. 816, at 843-847 and ftn. 52; (c) recently in

Parham v. J.R., 442 U.S. 584 (1979) this Court emphasized in a different context where state intrusion appears more limited, justified, or does not involve permanent severance, then, natural parents and not the state retain the substantial if not dominant role with regard to children, absent a finding of neglect or abuse; that a child is not a creature of the state; and that statist notions allowing governmental power to intrude in these relations absent the most compelling reasons of essential need is repugnant to our traditions;*/ or as noted in Stanley, 405 U.S. at 650, absent a powerful countervailing interest, the natural parent-natural child relation undeniably "warrants deference (and) protection"; (d) in Caban v. Mohammed, 441 U.S. 380 (1979), this Court's Opinion expressly left open the question whether adoption is permissible absent a showing of unfitness.

*/ Parham, 442 U.S. at 602-603.

Caban, 441 U.S. at 394, footnote 16. In that same decision, which incidentally followed Quilloin's adoption of the concurring statement in Smith, Justice Stewart appears to read that concurrence as one assuming "that each married parent after divorce has some substantive due process right to maintain his or her parental relation...." 441 U.S. at 397.

Undoubtedly some language in Quilloin may be read to imply a distinction in substantive and procedural protections between divorced parents and an existing family unit. On the other hand, Quilloin's emphasis on the fact that the father there, unlike the divorced parent, had never been a de facto member of the child's family unit suggests that if there is a distinction in when the state may intrude, it will require a good deal more of specificity in the statutory standards of "best interests" and

a great deal more than the most expansive reading of this record --- adverse emotional effects over visitation and greater security in the stepparent unit --- to overcome the constitutional rights at issue. (e) The grant of our own Petition in No. 80-45 urging these points is itself enough to show the reason why the writ should issue, unless on this Court's remand, the matter no longer reflects a case where its effects are "alive" and "irrevocably eradicated." See points supra and those noted in County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979) and cases there cited, showing here the still continuing effects.

2. The law and statute at issue has been interpreted as a matter of federal constitutional law, by the District of Columbia in a manner that conflicts with rulings on similar laws in other jurisdictions, a condition that warrants grant of the Petition.

In our prior Petition (No. 80-45), we observed that there is a conflict among the states on this issue. See Petition,

pp. 22-23 and cases cited. We would add to these cases, Linn v. Linn, 205 Neb. 218, 286 N.W.2d 765 (1980). It is directly contrary to J.S.R. That, too, warrants this review.

CONCLUSION

It is now over four years since the Petition for Adoption in this case was filed and more than five years since Mr. Johnson renewed his request for visitation granted in three prior court cases (the divorce and the two post-divorce proceedings).

Mr. Johnson has not seen nor had a right to see his children for years, not just months.

Ever since the ruling in this Court, no steps have been taken at all to allow visitation, nor since the February 9, 1981 Order have respondents taken action on the adoption order in spite of their solemn

representations that were in good faith. The issues simply were not addressed after remand.

Following this Court's Order of November 17, 1980 vacating the judgment below for a re-examination by the D.C. Court of Appeals, no court in the District of Columbia has declared the invalidity of the statute, nor the invalidity of the adoption order as it relates to further claims, nor even the nonapplication of both to Petitioner; nor has any change in the underlying case even occurred.

The public interest in resolving this law remains strong. The effects remain.

For these reasons and those in the Petition No. 80-45 that need no further repetition here, the Petition deserves to be granted.

Edward L. Genn
Counsel of Record for
Petitioner

Gilbert J. Genn
Counsel for Petitioner

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Eugene JOHNSON III, petitioner, v.
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Facts and opinion, D.C.App., 409 A.2d 1073.

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3

Eugene JOHNSON III, petitioner, v. J.
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Former decision, 101 S.Ct. 69.

Facts and opinion, 409 A.2d 1073.

Nov. 17, 1980. On petition for writ of certiorari to the District of Columbia Court of Appeals. Judgment vacated and case remanded to the District of Columbia Court of Appeals for further consideration in light of the position presently asserted by the respondent in his motion to dismiss filed October 27, 1980; the opposition filed thereto by petitioner on November 6, 1980; and the reply filed thereto by respondent on November 13, 1980.

EXTRACTS FROM GENERAL DOCKET
IN D.C. COURT OF APPEALS

14014 GENERAL DOCKET

DISTRICT OF COLUMBIA COURT OF APPEALS

(409 A.2d 1073, 2-22-80)

APPEAL FROM SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

(Adoption)

TITLE OF CASE

IN THE MATTER OF:

The Petition of J.O.L. II
for the Adoption of Minor Children,

EUGENE JOHNSON III, Appellant.

NO. BELOW: 92-77

COURT BELOW: FAMILY DIVISION

JUDGE BELOW: Paul R. Webber III

DATE OF JUDGMENT: August 9, 1978

NOTICE OF APPEAL FILED: August 9, 1978

***

(Pertinent Docket Entries Below)

DATE	FILINGS-PROCEEDINGS
12/16/80	ORDER amending this Court's 11/25/80 order to permit the record to be unsealed and to be made available to counsel for appellant and counsel for appellee until Monday, 1/5/81, the date on which the parties are to file memoranda addressing the remand issue (KyFPry) cmj
1/5/81	Memorandum of appellant on motion to remand (m-5) ag
1/5/81	Memorandum of appellee on motion to remand (m-5) ag
1/7/81	Suggestion of appellant for hearing en banc(m-7) - pp
1/16/81	Received Appellee's Opposition to suggestion for hearing en banc
2/2/81	Received Appellant's Reply to Opposition
2/9/81	ORDER that case is remanded to Superior Court with instructions to vacate the adoption decree (NwKyKnGNbHMFPry) cmj
3/3/81	MANDATE ISSUED kk
3/10/81	ORDER recalling mandate and vacating this Court's 2/9/81 order. (Judges Newman, Kelly, Kern, Nebeker, Mack, Ferren and Pryor) mkw
3/10/81	ORDER remanding case to the trial court for such further proceedings as deemed appropriate. (Judges Kelly, Ferren and Pryor) mkw
4/1/81	MANDATE ISSUED kk

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED
DECEMBER 16, 1980

No. 14014

IN THE MATTER OF:

The Petition of J.O.L. II
for the Adoption of Minor Children,

EUGENE JOHNSON III, Appellant.

92-77

BEFORE: Kelly, Ferren, and Pryor,
Associate Judges.

O R D E R

On consideration of appellant's motion to modify order of November 25, 1980, and for other relief and of appellee's response filed with respect thereto, it is

ORDERED this Court's November 25, 1980, order is hereby amended to permit the record to be unsealed and to be made available to counsel for appellant and counsel for appellee until Monday, January 5, 1981, the date on which the parties are to file memoranda addressing the remand issue.

PER CURIAM

copies to:

Honorable Paul R. Webber II

Clerk, Superior Court

Edward L. Genn, Esquire
1319 18th Street NW, 20036

Hal Witt, Esquire
1620 Eye Street NW, 20006

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED
FEBRUARY 9,1981

No. 14014

IN THE MATTER OF:

The Petition of J. O. L. II
for the Adoption of Minor Children,

EUGENE JOHNSON III, Appellant.

92-77

BEFORE: Newman, Chief Judge; Kelly, Kern, Gallagher, Nebeker, Harris, Mack, Ferren, and Pryor, Associate Judges.

O R D E R

This Court has considered the parties' memoranda on the motion to remand and the suggestion for hearing en banc, and it appearing that the majority of the judges of this Court has voted to remand the case to the Superior Court, it is

ORDERED that this case is hereby remanded to the Superior Court with instructions to vacate the adoption decree.

PER CURIAM

(copies were to the same parties as on previous order)

FILED
MARCH 10, 1981

DISTRICT OF COLUMBIA
COURT OF APPEALS

EN BANC ORDER
SUA SPONTE VACATING
FEBRUARY 9, 1981 ORDER

No. 14014

IN THE MATTER OF:

The Petition of J.O.L., II
for the Adoption of Minor Children,

Family 92-77

EUGENE JOHNSON, III.
Appellant.

BEFORE: Newman, Chief Judge; and Kelly, Kern, Nebeker, Mack, Ferren and Pryor, Associate Judges; and Gallagher, Associate Judge. Retired.

O R D E R

It is ORDERED, sua sponte, that the mandate issue by this Court on March 3, 1981, is hereby recalled, and the Clerk of the Superior Court is directed to transmit said mandate to the Clerk of the District of Columbia Court of Appeals forthwith. It is

FURTHER ORDERED that this Court's order of February 9, 1981, is hereby vacated.

PER CURIAM

(copies to parties listed
on previous order)

DISTRICT OF COLUMBIA
COURT OF APPEALS

FILED
MARCH 10, 1981
PANEL ORDER

No. 14014

IN THE MATTER OF:

The Petition of J.O.L., II
for the Adoption of Minor Children,

Family 92-77

EUGENE JOHNSON, III, Appellant.

BEFORE: Kelly, Ferren and Pryor,
Associate Judges.

O R D E R

On consideration of the parties' memoranda on the motion to remand, it is

ORDERED that this cause is hereby remanded to the trial court for such further proceedings as the circumstances of this case deem appropriate.

PER CURIAM.

(copies were to the same parties as on previous order)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
FAMILY DIVISION

EX PARTE IN THE MATTER OF)
the Petition of John O. LaGorce, II) Adoption
for the Adoption of Minor Children) No. A92-77

MEMORANDUM OPINION AND ORDER

Petitioner, J.O.L. filed the petition herein for the adoption of his wife's two minor children by a previous marriage. Respondent, the natural father of the minors, withheld his consent to the proposed adoption effectively halting any furtherance of petitioner's cause. 1/ Petitioner sought relief from the court pursuant to 16 D.C. Code

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1/ 16 D. C. Code 1973

§304 (a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgements, before a representative of a licensed child-placing agency, or before the Commissioner of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786. (R. 195)

1973 §304(d) and (e), 2/ and at the hearing on this matter, requested a finding in accordance with said provisions, that the respondent had abandoned his children and therefore his consent was not required, or in the alternative that respondent's consent was being withheld contrary to the best interests of the minors and therefore the petition should be granted. (R. 196)

I

Respondent and the children's mother were married to each other on May 5, 1961. The couple had two children, J.H.J. born on October 28, 1964 and E.E.J. born on January 27, 1967. In August 1967 the parents separated and on June 28, 1968 they were divorced. Custody of both children was awarded to the mother, and respondent by agreement was ordered to pay $75.00 per month towards the support of each child.

On April 25, 1969 the mother and petitioner were married and over the last nine years they have lived together with both children and the couple's first child, born on October 16, 1972, as members of a nuclear family. Petitioner, a

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2/ §304(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

41 year old volunteer schoolteacher, has established himself as the surrogate father of the two children involved. The record is replete with acts which manifest the sincerity of his affection for them, and his attention to the emotional needs and development of these youngsters has been salutary. It is clear that respondent is a good father to these children and that they in turn identify with him as their psychological father. Petitioner and his wife are financially secure and there is no issue regarding their ability, independently or collectively, to provide for the material needs of the children. (R. 197)

Respondent is a 39 year old experimental psychologist. After his divorce in 1968 he visited his children regularly until August, 1969 when he was hospitalized for a mental illness at the George Washington Psychiatric Clinic. After a brief stay of approximately twelve days he was released and in September, 1969 began visiting the children again. Despite his denials, the children's mother believed that respondent was a chronic schizophrenic and she insisted that petitioner be present during the visits with the children. Respondent did not favor this condition but abided by it until February, 1970 when his twice monthly visits ceased. During this period respondent initiated five telephone calls in an effort to contact the children, but the parties could reach no agreement regarding the conditions for a visit and consequently none occurred.

After his last telephone call on November 1, 1970 respondent had no further contact with petitioner's family until eight months later in July, 1971 when he brought an action in the Family Division of the Superior Court in case number D 2065-71 to obtain less restricted visitation privileges with his children. In that month an order pendente lite was issued in said case granting

respondent twice weekly visitation privileges in the presence of a third party other than petitioner. On July 20, 1972 a final order was entered pursuant to a settlement agreement, according respondent liberal visitation privileges without the presence of any third party. After this respondent visited with the children three more times, the last occasion being in October, 1972.

On the visits following the pendente lite order respondent encountered considerable resistance from the children. They would create a ruckus and refuse to accompany him anywhere. At times he was insulted, and he was also accused of wishing to break up their family. (R. 198)

The children complained that respondent badgered them regarding their lack of affection for him and made derogatory remarks about their mother. By his own admission respondent recognized that he was placing his children in a position of great emotional conflict, and at the expense of much personal pain, decided to discontinue his visits with the hope that when the children were older they would recognize the affection he felt for them and understand that he was a legitimate part of their lives. Respondent terminated his support payments in February 1973 because of his belief that they were unnecessary to provide for the needs of the children. The children's mother has expressed no desire to secure the resumption of those payments.

This action, filed in March, 1977, was precipitated by a telephone call that respondent made to the children's mother requesting a photograph of them. Because there had been no communication from him since October, 1972 the mother felt it would be wrong to honor the request without professional advice. She consulted a child psychiatrist who recommended that no photograph be sent and that petitioner consult with legal counsel.

Subsequently, this petition to adopt the minor children and thereby terminate respondent's rights as their natural father was filed.

(R. 199)

II

The petition alleges that respondent's consent is not required because he has abandoned his minor children.3/ In accordance with the statutory scheme it is the court's duty to determine whether such an abandonment has occurred.

The termination by law of the rights of a natural parent to his children on the grounds of abandonment is one of the most severe steps that a court may take. "The finality of the termination and the harsh connotations of a finding of 'abandonment' carry great emotional impact on both the child and the parent". In re Adoption of Sarver, 281 A.2d 890, 891 (Pa 1971). Accordingly, the court will be unwilling to make such a finding unless the record clearly warrants it.

The District of Columbia Code is silent as to the criteria to determine abandonment in a civil proceeding and, likewise, no appellate decision of this jurisdiction establishing such has been presented to the court.4/ The overwhelming majority

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3/ Id. § 304(d)

4/ In the abandonment cases presented from this jurisdiction, the factual determination of abandonment had been settled below and the issue of what constituted abandonment was not before the appellate court. See In the Matter of C.A.P., 356 A.2d 335 (D.C.C.A. 1976). Petition of J.E.G. and M.K.G., 357 A.2d 855 (D.C.C.A. 1976). White v. In the Matter of N.E.M., 358 A.2d 329 (D.C.C.A. 1976)

of jurisdictions, however, are of the view that an abandonment within the purview of the adoption law must be absolute, complete and intentional.5/ (R.200) Abandonment by a parent therefore, means the neglect and refusal to perform the natural and legal obligations of care and support or conduct which evinces a settled purpose to forego all parental duties and all parental claims to the children. In re Adoption of Sarver, supra., In re Farquharson, 102 N.Y.S. 2d 230 (1950); Stalder v. Stone, 412 Ill. 488, 107 N.E.2d 696 (Ill.1952); Shumway v. Farley, 68 Ariz. 159, 203 P.2d 507 (Ariz. 1949).

Certain specific acts of conduct may be distilled from the general case law as evidence of abandonment. Where the necessary criteria have not been established by statute, courts faced with this issue have focused in varying degrees, on whether the children were left permanently or identifinitely(sic) in the care of others;6/ whether the parent has deserted the children;7/ the voluntariness of the separation;8/ the period of time without any contact and the reasons therefor;9/ and the failure of the parent to provide for the support of the children.10/

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5/ Annot., 35 A.L.R. 2d 622, 664 (1954)

6/ In re Ewing, 96 Ida. 424, 529 P.2d 1296 (1974); Finn v. Rees, 65 Ida. 181, 141 P.2d 976 (1943)

7/ Shumway v. Farley, supra; In re Mayfield, 158 Or. 409, 76 P.2d 984 (1938); In re Davis, 142 Misc. 681, 255 N.Y.S. 416 (1932)

8/ In re Walpole's Adoption, 5 Ill.App. 2d 362, 125 N.E. 2d 645 (1955)

9/ In re Lieblich's Adoption, 207 Misc. 793, 141 N.Y.S. 2d 473 (1955)

10/ Annot., 35 A.L.R. 2d supra. 683 (1954).

As a divorced parent without custody, respondent had limited contact with his children and fairness demands that he be judged accordingly. Respondent made several visits with his children from the time of his divorce until the last visit in 1972, often against the desire of their mother and petitioner, and continually sought legal recourse whenever that right was threatened. Though he prevailed in his efforts to secure that right he eventually ceased to exercise it when he perceived the potential for harm to these children. Despite the fact that five years passed between his last visit and the filing of the petition for adoption, respondent's motives militate against a finding of abandonment. Ironically, it was his continued interest in his children which precipitated this action that may terminate his parental rights. Petitioner admitted that the request for photographs was viewed as a signal that respondent intended to re-enter the children's lives and both he and his wife feared the psychological effect that might have had on them.

Based on these facts the court finds that respondent lacked the requisite intent for a finding of abandonment. In a similar case in Pennsylvania, the natural mother had not contacted her child in six years. She had refrained from doing so at the request of the child's guardian who was concerned that the child was becoming confused that she should have two mothers. The mother stated that she complied with the request because she did not wish to upset her own child. The Supreme Court of Pennsylvania in reviewing the case found that these motives were inconsistent with a finding that the mother intended to abandon the child. In re Adoption of Sarver supra. While that decision is not binding in this jurisdiction, the court finds the factual evaluation therein as being persuasive in the case at bar.

(R. 202)

The petition also raises the issue of respondent's failure to provide any support over the last five years. While the court does not sanction such conduct, under the circumstances of this case and the prevailing state of the law, it does not find petitioner's argument persuasive. Only a few courts have taken the position that this criterion alone is sufficient to establish abandonment and then such failure to support has been held as not even tending to establish an abandonment where such conduct is excused by the circumstances.11/ Our own statute imposes a burden on the court to find that respondent "abandoned the prospective adoptee and voluntarily failed to contribute to his support..."12/ Giving the statute its plain meaning, the legislative intent appears to be that the court must first reach a conclusion as to the question of abandonment and then couple it, where present, with respondent's failure to support. This ensures that lack of support be present before termination of parental rights on a finding of abandonment, but excludes it as a factor to be given great weight on the central issue of abandonment.13/

(R. 203)

When measured against this standard respondent's action appears to have been motivated by parental love and concern rather than dereliction

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11/ Id 680; a C.J.S. Adoption of Persons § 61(b) (1972)

12/ See n. 2

13/ In resolving this issue, the court takes into consideration the fact that the children's mother, a person of substantial financial resources, acquiesced in respondent's non-support. See Smith v. Crivello, 338 Ill.App. 503, 88 N.E. 2d 107 (1949).

of duty. For these reasons the court cannot find that respondent's conduct evinces a settled intent to forego all parental duties and claims to his children sufficient to constitute an abandonment.

III

The petition also alleges that it is in the best interests of the minor children that they be adopted; that respondent's consent is withheld contrary to said interests; and that pursuant to 16 D.C. Code 1973 § 304(e) the court should grant the petition for adoption over respondent's objection.

It is the primary function of the court in these matters, to determine the best interests of the children and whether respondent is withholding his consent contrary to those interests. In re Petition for Adoption, 313 A.3d 874 (D.C.C.A. 1974). In re Adoption of a Minor, 97 U.S.App.D.C. 99, 228 F.2d 446 (1955). Petitioner has provided uncontroverted evidence of the emotional stability and physical well-being of the children in their present home. Petitioner's psychiatrist testified that the children accept petitioner as their psychological father and the court is urged to recognize in law what is already a fact. The recommendation of the social service department also cites this fact as the basis for its conclusion that the petition should be granted.

There is no question that the home petitioner provides for the children is the appropriate environment in which they should be reared. Unlike

the cases cited to the court14/ the outcome of this action has no bearing on that fact. Custody of the children rests with the mother and the family unit will remain intact as long as petitioner and his wife wish.

(R. 204)

After the issue of custody is taken from consideration the effect of an adoption on the children's welfare would be manifest in the following ways. It would legitimatize the status of the children in their home and terminate respondent's legal right to have access to them.

The former has been recognized as a valid concern which must be weighed in petitioner's favor as being in the best interest of the children. This is especially true, whereas here, the evidence indicates that the children consider petitioner their father, often using his surname as their own. This issue was addressed in a situation where a petition for adoption was denied as not being in the child's best interest because the petitioner was of a different race. The court held that:

> The child is living in the happy home of its natural mother and stepfather, receiving the same loving care they give to the two children born of their marriage. That it is in the best interests of the child to live in that home with the natural mother is obvious.

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14/ In re J.H., 313 A.2d 874 (D.C.C.A. 1974); In re Adoption of a Minor, 79 U.S.App.D.C. 191, 144 F.2d 644 (1944); In re Adoption of a Female Infant, 237 A.2d 468 (D.C.C.A. 1968); Petition of J.E.G. and M.K.G., 357 A.2d 855 (D.C.C.A. 1976).

> It is equally plain that the child will continue to live there no matter what disposition is made of the case. Hence denial of adoption could only serve the harsh and injust end of depriving the child of a legitimatized status in that home.

In re Adoption of a Minor, 97 U.S.App.D.C. 99, 101 (1955). Furthermore, it has been held in this jurisdiction that the right of parenthood is greater than having mere custody.15/ Petitioner will bear all the burdens of being a father to these children as they grow up and it will be to their benefit to provide him with the full legal authority to be able to act accordingly. (R. 205)

An adoption also results in a corresponding name change. While this fact alone is not of overriding importance, in view of the children's past behavior regarding this factor, there is no doubt that it will promoted the sense of security they would enjoy within the established family unit.

The other effect of an adoption would be to terminate respondent's legal right to visit with his children. The court is in sympathy with respondent because the pain this would cause is understood. However, the record is clear that his visits have an adverse emotional effect on the children. Respondent not only admits the fact but stresses it as his reason for refraining from visiting them for the past five years. When discussing this resentment that his children feel

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15/ In re J.H., 313 A.2d 874, 875 (D.C.C.A. 1974)

towards him respondent acknowledges that "the probability is that they will not change". Nevertheless, respondent urges that the petition should be denied to prevent the father from anymore hurt than he has already endured. Unfortunately, the power of the court's writs falls short of the control of human emotions. Ever mindful of the pain it may cause, the ruling of this court must be according to law. The adoption proceeding is a creature of statutes and is a right that was unknown at common law. In re Jarboe's Estate, 235 F.Supp. 505 (D.C.D. C. 1964). As such, those statutes evince the will of the legislature and pursuant thereto it is the best interest of the children that must receive the overriding concern of the court. While respondent's interests as their natural father must not be unreasonably discarded, they must sit lighter in the scales of justice.16/ (R. 206)

These matters inherently involve predicting the future to some degree, but the court has not been imbued with the powers of a clairvoyant. The risk of error therefore accompanies any decision that it may render. However, if there is error the overwhelming conclusion based on the statutory scheme must be that the court should err in favor of the best interests of the children.

Respondent for five years failed to exercise his right to visit. A failure he states was based on his own concern because he recognized the emotional disturbance that his visits created. Nevertheless, he argues that he should be allowed to retain this right, in light of all the other benefits it would deny the children, so he may force the children from the "sheltered cocoon" in which

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16/ 2 C.J.S. Adoption of Persons § 93 (1972)

they exist and into the real world to acknowledge him as their father. There is merit in the contention that these children should acknowledge respondent's love for them as their natural father, but the course of action recommended to achieve that result is dubious at best. When viewed from the children's point of view, the choice is between giving final security to the family unit of which these children are in every way an integral part or leaving them to wander upon a course of uncertainty in the hope that someday they will be able to accept and benefit from respondent's love. The past experience suggests, and respondent admitted that that hope is a slim one. Based on this record, a ruling favoring the adoption is warranted.

In light of the statutory mandate and the evidence presented it is the conclusion of the court that the adoption is in the best interests of the children and that respondent is withholding his consent contrary to said interests.

(R. 207)

Accordingly, it is this 3rd day of August, 1978,

ORDERED that the petition for adoption herein, be, and hereby is, granted.

Paul R. Webber, III

J U D G E

Copies to: Hal Witt, Esq., 1620 Eye Street, N.W., Washington, D.C. 20006, Attorney for Petitioner

Edward L. Genn, Esq., 1341 G Street, N.W., Suite 610, Washington, D.C. 20005, Attorney for Respondent

(Officially reported as "Petition of J.O.L." in 409 A.2d 1073.)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14014

IN THE MATTER OF:

The Petition of J.O.L. II for the Adoption of Minor Children,

EUGENE JOHNSON III, APPELLANT.

Appeal from the Superior Court of the District of Columbia

(Hon. Paul R. Webber III, Trial Judge)

(Argued September 21, 1979 Decided December 10, 1979)

Edward L. Genn for appellant.

Hal Witt, with whom *Janice S. Pohl* was on the brief, for appellee.

Before KELLY, FERREN and PRYOR, *Associate Judges.*

PRYOR, *Associate Judge*: Over the objection of appellant, the natural father of two children, the trial court granted a petition for the children's adoption by the stepfather. Appellant appeals, asserting that (1) the "best interests of the child" standard of D.C. Child*Code 1973, § 16-304(e) is substantively and procedurally unconstitutional as applied to a natural parent; and that (2) the

*(sic)

trial court erred in concluding there was clear and convincing evidence in the record to reach a conclusion that adoption by appellee is in the best interests of the children. After reviewing the case, we do not find that the court's judgment is erroneous or without evidence to support it, *Petition of Douglas*, D.C.App., 390 A.2d 1, 3 (1978), therefore, we affirm. (409 A.2d 1074)

Appellant and the children's mother were married in 1961. The couple had two children, the adoptees, one on October 28, 1964, the other on January 27, 1967. The parents separated in 1967, and were divorced on June 28, 1968. Custody of the children was awarded to the mother and by agreement, appellant was obliged to make monthly child support payments.

On April 25, 1969, the mother and appellee were married and began living together with the adoptees. In October 1972, a child was born to the couple. The three children, appellee and his wife presently live together as a family unit.

Appellant is a forty-year-old experimental psychologist. After his divorce from the adoptees' mother in 1968, he visited his children regularly until 1970.[1] As a consequence of a continuing dispute between appellant and the children regarding visitation, appellant stopped visiting the children. Attempts were made to resolve the problem, but the parties could not reach agreement. Thereafter, appellant brought an action in court and was subsequently granted visitation privileges. While this matter was pending in court, appellant attempted on several occasions to visit his children but encountered con-

[1] This period of visitation was interrupted briefly when, in August 1969, appellant was hospitalized for approximately twelve days for mental illness. Thereafter, in September 1969, appellant began visiting the children again.

siderable resistance from them. Recognizing that his visits were upsetting the children, appellant decided to stop visiting them until they were mature enough to understand the situation.

In March of 1977, having had no communication from appellant since October 1972, the children's mother received a phone call from appellant requesting a photograph of the children. This prompted consultation with a child psychiatrist. Not long afterwards, this action was instituted.

The trial court conducted an extensive hearing on the petition for adoption. The court heard from the children (*in camera*), the natural parents, and the stepfather. Witnesses testified about the interaction of the children with the appellee and their relationship with their natural father. A child psychiatrist stated his views as to the mental health of the children.

The court found that both of the adoptees viewed appellee as their "real father" and that he had become the psychological parent of the children. There was evidence that the children were under extreme emotional stress as the result of being legally obligated to visit with their natural father, but not desiring to do so. There was some question as to the appellant's mental health and his illegal use of drugs.

Acknowledging that the appellant at no time abandoned his children or otherwise abused them, the trial judge nevertheless concluded that the father's consent to their adoption by appellee was being withheld contrary to the children's best interests.

I.

We are concerned with a statute which, in pertinent part, reads as follows:

> The court may grant a petition for adoption without any [consent from natural parent(s)] . . . when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child. [D.C. Code 1973, § 16-304(3).]

We previously upheld the constitutionality of this statute in *In the Matter of Petition for Adoption of J.S.R.*, D.C. App., 374 A.2d 860 (1977). Appellant attempts to distinguish the facts in this case by arguing that in *J.S.R.*, *supra*, this court ruled on the facial constitutionality of the statute. In this instance, appellant requests that we rule on the constitutionality of the statute as applied to a natural parent. While we recognize that this distinction can properly be drawn in interpreting some statutes, we find that in this instance the argument is, in large measure, circular in nature. To argue that the adoption of a child without the consent of a natural parent, pursuant to a statutory standard of "best interests of the child," is defective constitutionally is to return to the issues raised and discussed in *J.S.R.*, *supra*. (1075)

In *J.S.R.*, *supra*, as in the instant case, it was the natural parent who questioned the constitutionality of § 16-304(e). While the appellant in that case did not specifically challenge the statute as applied to a natural parent, in reaching our conclusion that § 16-304(e) was not unconstitutionally vague, we noted, with approval, that the "best interest of the child" standard has been applied "in custody disputes between parents, and between parent and nonparent [as well as] . . . in child neglect cases . . . ." *J.S.R.*, *supra* at 863 (footnotes omitted). We see no reason to deviate from this standard in cases where natural parents challenge the adoption of their child by a stepparent, even where there is no show-

ing of abandonment and custody is not an issue in the case. The underlying objective is the same and that is to arrive at an arrangement that will be in the best interest of the child. This arrangement may require that the court (1) leave circumstances as it finds them, (2) change the custody of the child, or (3) grant a petition for adoption. The arrangement will be that which the trier of the fact finds to be in the best interest of the child.

We have previously recognized [2] that there is no precise formula for determining what is best for the child. Circumstances, foreseeable and unforeseeable, will vary across a wide spectrum. Experience has shown that it would probably be unwise to attempt to fashion a standard which would likely be more specific but also less flexible. In *J.S.R.*, *supra* at 863, we said:

> To say that such standard lacks precise meaning is not to say that it is without content and bounds . . . We think it is plain that the standard "best interest of the child" requires the judge, recognizing human frailty and man's

---

[2] In *Bazemore v. Davis*, D.C. App., 394 A.2d 1377, 1383 (1978), this court stated that:

> A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations . . . [I]t is not asking too much to demand that a court, in making a determination as to the best interest of a child, make the determination upon specific evidence relating to that child alone . . . magic formulas have no place in decisions designed to salvage human values . . . [T]he trial court shall decide the delicate question of what is the child's best interests solely by reference to the facts of the particular case . . . .

See also: *In re N.M.S.*, D.C. App., 347 A.2d 924 (1975); *Coles v. Coles*, D.C. App., 204 A.2d 330 (1964).

> limitations with respect to forecasting the future course of human events, to make an informed and rational judgment . . .

The cumulative lesson of this approach is that it cannot operate with pinpoint precision but, more importantly, does allow the trial judge to evaluate the persons involved and the choices available. In this instance the trial judge applied the statute by considering at least the following factors: (1) questions of family stability, (2) present and future effects of adoption or non-adoption on the child, (3) interaction between the child and the contestants, (4) who the child perceives as his or her psychological parent, (5) the child's adjustment to his or her living situation, school, and community, and (6) mental and physical health of all interested parties.

Accordingly, we find no merit to the contention that the statute was unconstitutionally applied.

II.

As an additional ground for reversal, appellant urges that the trial court erred in concluding there was clear and convincing evidence in the record from which it could reach a conclusion that the adoption by appellee is in the best interest of the children.

During the course of a three-day hearing on the petition for adoption, the trial court heard from all interested parties, observed the demeanor of the witnesses and interviewed the adoptees in his chambers. The court found that the adoptees live in the home of their natural mother and stepfather both of whom assume an active role in the supervision and development of the children. The natural mother and stepfather love and care for the children as they do the child of their marriage.

*409 A.2d 1076

In reaching the conclusion that adoption was in the best interest of the children, the trial court noted:

> Respondent for five years failed to exercise his right to visit. A failure he stated was based on his own concern because he recognized the emotional disturbance that his visits created [sic]. Nevertheless, he argues that he should be allowed to retain this right, in light of all the other benefits it would deny the children, so he may force the children from the "sheltered cocoon" in which they exist and into the real world to acknowledge him as their father. There is merit in the contention that these children should acknowledge respondent's love for them as their natural father, but the course of action recommended to achieve that result is dubious at best. When viewed from the children's point of view, the choice is between giving final security to the family unit of which these children are in every way an integral part or leaving them to wander upon a course of uncertainty in the hope that someday they will be able to accept the benefit from respondent's love. The past experience suggests, and respondent admitted that that hope is a slim one. Based on this record, a ruling favoring the adoption is warranted. [Mem. Opinion and Order at 12.]

We are satisfied from a review of the record that the court's judgment is not erroneous or without evidence to support it.

Affirmed.

AMENDMENT I--FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT V

"No person shall be...deprived of life, liberty, or property, without due process of law...."

AMENDMENT IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

DISTRICT OF COLUMBIA CODE

TITLE 16

CHAPTER 3

ADOPTION

§16-304. Consent

(a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgments, before a representative of a licensed child-placing agency, or before the Mayor of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786.

(b) Consent to a proposed adoption of a person under eighteen years of age is necessary:

(1) from the prospective adoptee, if he is fourteen years of age or over; and also,

(2) in accordance with the provisions of any one of the following paragraphs:

(A) from both parents, if they are both alive; or

(B) from the living parent of the prospective adoptee, if one of the parents is dead; or

(C) from the court-appointed guardian of the prospective adoptee; or

(D) from a licensed child-placing agency or the Mayor in case the parental rights of the parent or parents have been terminated by a court of competent jurisdiction or by a release of parental rights to the Mayor or licensed child-placing agency, based upon consents obtained in accordance with paragraphs (A) through (C) of this subdivision, and

the prospective adoptee has been lawfully placed under the care and custody of the agency or the Board; or

(E) from the Mayor in any situation not otherwise provided for by this subsection.

(c) Minority of a natural parent is not a bar to that parent's consent to adoption.

(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

(f) A person over eighteen years of age may be adopted, on the petition of the adopting parent or parents and with the consent of the prospective adoptee, if the court is satisfied that the adoption should be granted. As amended July 29, 1970, Pub.L. 91-358, Title I, § 145(a)(2), 84 Stat. 555; Oct. 22, 1970, Pub.L. 91-488, 84 Stat. 1086; July 22, 1976, D.C.Law, No. 1-75, § 5(e), 23 D.C.Reg. No. 6, p. 1177; Oct. 1, 1976, D.C.Law, No. 1-87, § 12, 23 D.C.Reg. No. 6, p. 1134.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 80-252

IN THE MATTER OF: B.K., APPELLANT.

Appeal from the Superior Court of the District of Columbia

(Hon. James A. Washington, Jr., Trial Judge)

(Argued February 19, 1981 Decided March 11, 1981) *

Melvin A. Marshall for appellant.

Richard B. Nettler, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for appellee. *David P. Sutton*, Assistant Corporation Counsel, also entered an appearance for appellee.

Before KELLY, FERREN and PRYOR, *Associate Judges.*

PER CURIAM: The District of Columbia has the authority pursuant to D.C. Code 1973, §§ 16-2301, -2320, to protect a "neglected child" by removing that child from the custody of his or her parents. In this appeal, the father of a child found to be "neglected" challenges

* The original disposition of this case was by an unpublished Memorandum Opinion and Judgment. The motions for publication were granted.

both the finding below and the constitutionality of the D.C. Statute. We deem appellant's arguments to be without merit and therefore affirm.

I

The young girl, B.K., whose present and future well-being is the central concern of this proceeding, was born on September 19, 1978, at the Georgetown University Hospital. Both her parents have been diagnosed as suffering from undifferentiated paranoid schizophrenia. Although appellant argues that the court below incorrectly focused on the parents' mental illness rather than the well-being of the child, it is clear from the record that the parents' condition was considered relevant only insofar as it pertained to their ability to provide proper care for B.K. The evidence showed that they were unable to do so, and that when in their care, B.K.'s physical and emotional health was threatened.

During the period while she was in the hospital delivering her baby, B.K.'s mother exhibited strange behavior which prompted further examination by staff psychiatrists. The mother's condition was diagnosed as a "classic case of schizophrenia" and the prediction was that she would be unable to comprehend her child's emotional and physical needs. Although the Child Protective Services Division of the Department of Human Resources was apprised of the situation by doctors at Georgetown, there was no direct intervention by the Division at that time. On February 16, 1979, the Child Protective Services Division was again contacted about this unfortunate situation when the father of B.K.'s mother informed the Division that his daughter and appellant had been arrested while standing in the middle of the street, apparently under the influence of drugs. The events which finally caused intervention by the Protective Services Di-

vision began on March 23, 1979, when pedestrians observed appellant and B.K.'s mother, with B.K. in a stroller, walking downtown at about 11:00 p.m. According to the pedestrians, appellant and B.K.'s mother appeared to be disoriented and intoxicated, and B.K. was screaming. This alarmed the pedestrians who approached the couple. At that point, B.K.'s mother walked away and, after arguing with the pedestrians, appellant also left. The pedestrians then took B.K., who was clad only in a thin cloth pajama, into the Embassy Row Hotel where they called the police. After police arrived on the scene, B.K.'s mother appeared at the hotel. Since she appeared to be intoxicated, the officers transported her to the detoxification unit of the D.C. General Hospital. Meanwhile, B.K. was taken into custody by the Youth Division of the Metropolitan Police Department.

That night, a police officer and an investigator for the Protective Services Division visited the Kalorama Road house where appellant lived with B.K. and B.K.'s mother. According to their testimony, and the testimony of an inspector for the Housing and Community Development Department who inspected the house on March 27, 1979, the premises were, to put it mildly, not very pleasant. There was plaster falling from holes in the ceiling, cracks in the walls, no adequate kitchen facilities, dirty pampers strewn all over the floor, profuse odors, human and animal feces on the first and second floors, broken windows in the bathroom and, due to a structural defect, water was leaking on exposed wiring. According to the housing inspector, these conditions were dangerous and constituted a health hazard.

When he was visited on the night of March 23, 1979, by the police officer and the housing inspector, appellant agreed to permit the Child Protective Services Division to provide emergency care for B.K. However, on March

27, 1979, B.K. was released into the custody of her mother, who at that time expressed her willingness to cooperate with Protective Services. Only a few days later, during the evening of April 3, 1979, B.K. was again taken into protective custody. Customers and employees in a restaurant had observed B.K.'s mother, seated at a table, swinging B.K. through the air. With each swing, B.K.'s head came perilously close to colliding with the table top. The acting manager of the restaurant, after talking to B.K.'s mother, became concerned for the safety of the child and called the police. All the while, appellant was seated at the bar, apparently oblivious to the situation. When the police arrived, B.K. and her mother were taken into custody. B.K. was placed in shelter care at St. Ann's Infant Home.

At this point, the Protective Services Division began a more thorough investigation of the circumstances surrounding B.K.'s care and both parents underwent physical and mental examinations. On April 10, 1979, a petition was filed in Superior Court alleging that B.K. was a "neglected child" under D.C. Code 1973, § 16-2301(9)(B) & (C).[1]

---

[1] The term "neglected child" means a child—

* * *

(B) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his parent, guardian, or other custodian;

(C) whose parent, guardian, or other custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity; . . . [D.C. Code 1973, § 16-2301(9)(B) & (C).]

A lengthy factfinding hearing was conducted in the Superior Court Family Division beginning on October 15, 1979. Extensive testimony was heard from case workers and psychiatrists regarding B.K. and her parents. Appellant's landlady and a Catholic priest testified on behalf of B.K.'s parents. At the conclusion of the evidence, the court issued its findings of fact and ruled that the government had shown, by a preponderance of the evidence, that B.K. was neglected within the meaning of the statute. A dispositional hearing, pursuant to D.C. Code 1978 Supp., § 16-2320(a)(2) and (3), was held on December 18, 1979, and B.K. was placed in the custody of her maternal grandparents.

II

We emphasize at the outset that the order below does not terminate parental rights but merely determines custody of the neglected child for a period of two years, at which time further proceedings must be held. *See In re: H.M.*, D.C.App., 386 A.2d 707 (1978).

The trial court correctly stated that in a neglect proceeding the government must prove its case by a "preponderance of the evidence." This is clear from the statute itself. D.C. Code 1973, § 16-2317(c)(2).[2] Appellant,

---

[2] The pertinent section reads:

(c) If the Division finds in a factfinding hearing that—

* * *

(2) the allegations in a need of supervision or neglect petition have been established by the preponderance of the evidence,

the Division, after giving the notice required by subsection (a) of this section, shall proceed to hold a dispositional hearing. . . .

however, argues that because the ruling below separated him from his child, and thus threatens the sanctity of his family, *see Moore v. City of East Cleveland*, 431 U.S. 494 (1979), the Constitution requires that the standard of proof be "clear and convincing evidence." In *In re: J.S.R.*, D.C.App., 374 A.2d 860 (1977), we stated that the consequences of a finding that parental consent to an adoption was being withheld contrary to the best interests of the child are "far more severe than those of a finding of neglect." *Id.* at 864. Nonetheless, we held that, although the higher standard of "clear and convincing evidence" was warranted in the adoption case, it was not constitutionally required. Therefore, it follows that in a neglect proceeding the Constitution does not require the "clear and convincing evidence" standard.

Our holding in *In re: J.S.R.* is not altered by *Addington v. Texas*, 441 U.S. 418 (1979), in which the Supreme Court held that due process requires the "clear and convincing" standard of proof in a civil proceeding brought to commit an individual involuntarily for an indefinite period of time to a state mental hospital. The individual's liberty interest at stake in *Addington* is greater than appellant's interest in retaining custody of his child, particularly when balanced against the interest of the state in protecting neglected children.

On the basis of the record in this case, we are satisfied the child was shown to be neglected by a preponderance of the evidence. We note also that the trial court stated in its findings that even under the "clear and convincing" standard the government had made its case. That exemplifies both the solicitousness of the trial court for the interests involved and the great weight of the evidence presented by the government.

[360-F]

III

Appellant also challenges the constitutionality of the neglect statute pursuant to which the petition was brought. We cannot quarrel with appellant's assertion that the state must tread carefully when it intrudes upon the integrity of the family unit. *See Moore v. City of East Cleveland, supra; Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Stanley v. Illinois*, 405 U.S. 645 (1972). This court recognized that fundamental proposition in *In re: J.S.R.*:

> The right of a natural parent to raise one's child is a fundamental and essential one which is constitutionally protected. However, it is not an absolute one. The state has both the right and the duty to protect minor children through judicial determinations of their interest. To this end, the state has a substantial range of authority to protect the welfare of a child, and the state's legitimate interest in the child's welfare may be implemented by separating the child from the parent. [*Supra* at 863 (citations omitted).]

Appellant contends the statutory definition of a "neglected" child is vague, and therefore unconstitutional. In order to withstand a vagueness challenge the statute must state its standard with adequate clarity and make sufficiently distinct boundaries for the law to be fairly administered. *Roth v. United States*, 354 U.S. 476 (1957). The Supreme Court has reminded us that in considering vagueness, statutes which do not involve First Amendment freedoms must be evaluated in light of the facts of the case at hand. *United States v. Mazurie*, 419 U.S. 544 (1975); *see In re: A.B., Jr.*, D.C.App., 395 A.2d 59, 61 (1978). The statute in question here may be broad

in its coverage, but we are not persuaded that it is vague. We point out that "proceedings under this type statute demand and provide a certain amount of elasticity to the court." *Matter of C.M.S.*, 609 P.2d 240, 244 (Mont. 1979). The statute requires an investigation into the circumstances of the particular case and provides clear guidelines for determining whether a child is neglected. On the facts of this case, there is no question that such a finding was proper.

Affirmed.

Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE JOHNSON, III,
Petitioner,

v.

J.O.L., II,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR J.O.L., II, IN OPPOSITION

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July 10, 1981

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PARTIES TO THE PROCEEDING

Petitioner is Eugene Johnson, III. Respondent is J.O.L., II. The mother of the adoptees, referred to by petitioner as the "former wife" (Pet. *iii*), was not a party below.

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STATEMENT OF THE CASE

This case commenced on March 31, 1977, when respondent (petitioner below) filed a petition for adoption in the Superior Court of the District of Columbia, Family Division, seeking adoption by respondent of the adoptees. Respondent is married to the mother of the adoptees. Petitioner (respondent below) is the biological father of the adoptees.

Pursuant to D.C. Code §16-304(e), a full evidentiary hearing was held on May 24, 25 and 26, 1978. The trial court entered its memorandum opinion and order on August 3, 1978, granting the petition for adoption. Said

order was affirmed by the District of Columbia Court of Appeals on December 10, 1979, and petitioner's petition for rehearing *en banc* was denied on March 27, 1980. On July 10, 1980, petitioner filed with this Court his first petition for a writ of certiorari. The Court granted the writ on October 6, 1980.

On October 27, 1980, respondent filed with this Court a motion to dismiss the writ of certiorari and to remand the case to the trial court so that the adoption decree could be vacated. On November 6, 1980, petitioner filed an opposition to respondent's motion to dismiss. Respondent filed a brief reply to petitioner's opposition on November 13, 1980. On November 17, 1980, this Court vacated the judgment of the D.C. Court of Appeals and remanded the case for further consideration in light of the positions asserted by respondent in his motion to dismiss, petitioner's opposition and respondent's reply thereto. Petitioner's request for a rehearing on this Court's remand decision was denied on December 15, 1980.

Pursuant to this Court's November 17, 1980 remand decision, the D.C. Court of Appeals ordered the parties to file memoranda addressing the remand issue on or before January 5, 1981. The parties filed their memoranda as instructed, and petitioner subsequently suggested a hearing *en banc*. Upon consideration of the memoranda filed by the parties on the remand issue and the suggestion for hearing *en banc* filed by petitioner, the D.C. Court of Appeals remanded the case to the D.C. Superior Court with instructions to vacate the adoption decree. On March 10, 1981, the D.C. Court of Appeals, sua sponte, vacated its order dated February 9, 1981, which remanded the case to the trial court with instructions to vacate the adoption decree, and ordered the case

remanded to the trial court for such further proceedings as the circumstances of the case deem appropriate.

On June 8, 1981, petitioner filed with this Court his second petition for a writ of certiorari, which was received by respondent on June 10, 1981. Respondent hereby files his opposition to petitioner's second petition for a writ of certiorari in this case.

ARGUMENT

On November 17, 1980, this Court vacated the judgment of the District of Columbia Court of Appeals and remanded the case for further consideration in light of the positions set forth by the respondent in his motion to dismiss the writ of certiorari, the petitioner's opposition thereto and the respondent's reply to petitioner's opposition. Pursuant to this Court's remand decision, the D.C. Court of Appeals ordered both parties to prepare and file memoranda addressing the remand issue. Upon consideration of the positions set forth by the parties in their memoranda, the case was remanded to the Superior Court of the District of Columbia, where it is now pending.

Petitioner now asks this Court to intervene in the remand proceedings of the courts of the District of Columbia and to issue what would be, in effect, an advisory opinion as to the constitutionality of the statute involved in this case. Petitioner's request, at this procedural juncture, ignores a cardinal principle of constitutional law and the well-established policy of this Court to avoid premature and unnecessary adjudication of constitutional questions. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568-75 (1947).

Petitioner complains that the D.C. Court of Appeals remanded the case to the trial court without first invalidating the challenged statute. Petitioner's suggestion

to the D.C. Court of Appeals for a hearing *en banc* presented a host of abstract hypotheticals which were not relevant to the remand proceeding then pending in the D.C. Court of Appeals pursuant to this Court's November 17, 1980 memorandum decision. Instead of engaging in speculation about hypothetical constitutional infirmities, the D.C. Court of Appeals focused on the memoranda submitted by the parties concerning the remand issue, strictly in accord with this Court's November 17, 1980 memorandum decision. Upon consideration of the parties' memoranda and in furtherance of this Court's remand decision, the D.C. Court of Appeals remanded the case to the Superior Court of the District of Columbia.

Respondent submits that the remand action of the D.C. Court of Appeals, about which petitioner now complains, was strictly in accord with this Court's November 17, 1980 memorandum decision, and that the D.C. Court of Appeals was under no obligation whatsoever to render any decision about the constitutionality of the challenged statute, as petitioner now contends. *See Leiss v. United States,* 364 A.2d 803 (D.C. 1976), *cert. denied,* 430 U.S. 970 (1977) (decisions of constitutional dimension should be made only as specifically required by the facts of an actual controversy).

This Court vacated the judgment of the D.C. Court of Appeals so that the case could be remanded to the Superior Court of the District of Columbia for further proceedings. The case is now pending in the D.C. Superior Court. The challenge raised by petitioner at this procedural stage seeks to short-circuit the remand proceedings initiated by this Court and would spur premature and unnecessary adjudication of hypothetical constitutional questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 10, 1981

No. 80-2101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

Eugene Johnson, III,

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v.

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Respondent.

On Petition for a Writ of Certiorari to the
District of Columbia Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 1981, three copies of the foregoing Brief for J.O.L, II, in Opposition were personally served on Edward L. Genn, Esquire, 1319 - 18th Street, N.W., Washington, D.C. 20036, counsel for petitioner.

Hal Witt by PTS

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Office-Supreme Court, U.S.
FILED
JUL 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2101

Supreme Court of the United States

October Term 1980

Eugene Johnson III, Petitioner

v.

J.O.L. II, Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

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PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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638-2027
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July 31, 1981

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No. 80-2101

Supreme Court of the United States

October Term 1980

Eugene Johnson III, Petitioner

v.

J.O.L. II, Respondent

On Petition for Writ of Certiorari to
the District of Columbia Court of Appeals

PETITIONER'S REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Brief of J.O.L. II in Opposition to the Petition

(a) does not dispute the nature of the important issues presented by petitioner relating to divorced parents subject to adoption laws that permit the permanent severance of the parent-child relationship on best interests standards, although there is no showing of unfitness, abuse or abandonment;

(b) does not dispute the statement of facts essential to the cause;

(c) does not dispute the actual nature and the argued effect of the opinions below as not altering the legal conditions that earlier existed at the time this Court granted the Petition in Petition No. 80-45;

(d) does not address the pertinent standards and references in Nebraska Press Assn. v. Stuart, 427 U.S. 539, 547 (1976), or County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979), referred to in our Petition at p. 22;

(e) does not address the application of those standards, duly noted in our Petition, showing that by the next time there is full plenary review of the pending remand, it is probable that at least the eldest child (Mr. Johnson's daughter) will have reached majority; so that, as to her, the cause will be said to be truly moot (for as shown in the original granted Petition, that daughter, Judith, born in October 1964 will be 18 in October 1982, Petition No. 80-45, p. 7, W.Tr.5);

(f) ignores the point that the trial court cannot declare the unconstitutionality

of the statute, whether facially or as applied to Mr. Johnson, or the invalidity of the continuing authority on which our vacated appellate case was based;

(g) avoids the fact that In the Matter of Petition for Adoption of J.S.R., D.C. App., 374 A.2d 860 (1975), which earlier established the constitutionality of the statute, its standards and the procedures used here to the father's deprivation, remain the law; and by ignoring it, the Opposition avoids reaching the point that only the Court of Appeals could have effected that change on the matters before it after this Court's remand;

(h) does not address the fact that the effects of the prior adjudications either in fact cannot be "irrevocably eradicated" (the test in County of Los Angeles v. Davis) without a ruling on the

constitutionality of the adoption law or application of its "best interests" standards to divorced parents who are not unfit or abusive, in order for Mr. Johnson to have the necessary predicate for his declaratory claim and further relief;

(i) has completely shifted the ground of the Opposition made and urged to this Court at the time of its Motion to Dismiss in No. 80-45 and to the Court of Appeals thereafter --- mootness allegedly arising because Respondent stated he would consent to the vacating of the adoption order --- a ground he now appears to concede does not apply in the light of the failure of the Court of Appeals to address the ruling in J.S.R., supra, nor what is "live" as a predicate to full relief; instead, he now shifts to a claim that the new Petition should be denied because it is premature.

While he admits that Mr. Johnson

raised the issues asserted, Respondent J.O.L. now urges that they involve a "premature and unnecessary adjudication", Brief in Opposition p. 3.

No one disputes the general abstract principle that this Court will avoid premature rulings or "advisory" rulings.

While the principle is not in doubt, it is simply not at all applicable to these facts.

The trial Court cannot rule --- either in fact or in time for plenary review before Judith becomes 18 --- on the critical constitutional issues that are necessary for full relief.

Voluntary cessation or agreement now to the vacating of the adoption order neither affords full direct nor declaratory relief that may or will irrevocably eradicate the unconstitutionally-imposed

actual past effects and threats of effects.

And before there is full plenary review, even if the trial court went beyond its power, one child would reach 18.

This record, after the inaction of the Court of Appeals, therefore, shows neither mootness nor prematurity, but a live controversy that is not hypothetical and not "advisory".

See Bellotti v. Baird, 428 U.S. 132, N. 7(1976) (termination of pregnancy does not moot the constitutional issue); see also Nebraska Press Assn. v. Stuart and County of Los Angeles v. Davis supra. Compare also, Hutchinson v. Proxmire, 443 U.S. 111 (1979) where this Court recognized and addressed the issues urged because it was clear what would occur at the appellate level if it did not do so --- a likely ruling not addressing the issues

pressed and more delay. That is the condition here. See also Storer v. Brown, 415 U.S. 724, 738 fn. 8 (1974).

Putting aside how much this new shift from alleged mootness to "prematurity" reflects on Respondent's good faith; putting aside what the Opposition omits to address or ignores; putting aside the fact that all our issues were raised before the Court of Appeals in our Opposition to the Motion to Remand as well as the contemporaneously-filed Suggestion for an En Banc Hearing (to deal with claims of facial unconstitutionality of the statute or as to its applied unconstitutionality to clarify or limit its prior J.S.R. standards rulings); putting all this to the side, as matters now stand, it is neither a hypothetical nor speculative fact, but an undeniable fact that the trial court still has before

it the same unchanged statute, the same D.C. Court of Appeals ruling that it is constitutional (In the Matter of Petition of J.S.R., D.C. App. 374 A.2d 860, 1977), the same claim for full relief that it had before the remand, and the same important questions about the rights of divorced parents under that best interests adoption statute where there is no showing of unfitness, abuse or abandonment.

Even if the trial court could grant much more than Respondent J.O.L. has said in his limited consent he would agree to (merely a vacating of the adoption Order), by the time of any probable full plenary review of that trial court action, Judith will have reached majority.

All Respondent need do, if the trial court went beyond its power or what would be its likely action on his limited consent, is to file an appeal to let that

short time run.

In sum, if this Court does not take review now, any meaningful right to "full plenary review" through the courts to eradicate the effects of the deprivation is theoretical at best --- because it will be said to be fully moot by October of next year as to one child.

The fact is that Respondent, J.O.L. is likely to appeal any trial court ruling that goes beyond his limited consent to the formal setting aside of the adoption Order.

Mr. Johnson is likely to appeal any ruling that is limited to it.

The critical fact, however, is that while this goes on, the children come closer to majority, all past lost time with the children and delays to the side.

Respondent J.O.L. delayed over three

and one-half (3-1/2) years up until this Court granted the writ and therefore until just before full plenary review in this Court, before offering to consent to the vacating of the adoption decree.

By now, it is far more probable than not that any appeal of any ruling by either party in the present circumstances (with the statute still unaffected, J.S.R. still the local law and full relief at issue) will not be concluded much earlier than before (three and one-half years); at the very least, it is almost certain that full plenary review and the consideration of methods to eradicate the effects of the unconstitutional statute and its standards (see Nebraska Press Assn. v. Stuart and County of Los Angeles v. Davis, supra) will not occur before next October.

That is not a speculative fact but a probable event.

There is nothing hypothetical in the prior delay and the permanently lost parental rights.

There is nothing advisory about the existing law and statute that the D.C. Court of Appeals refused to address, nor the claims in that Court, as in our Opposition in this Court, that that law, on remand, was an obstacle to full relief.

There is nothing speculative about the likelihood that real mootness may arrive while plenary review continues if the matter is left with the lower court.

When this Court vacated the judgment in this case last November, its references did not mean that the District of Columbia Court of Appeals was to be no more than a conduit for a pass-through ruling

to the lower Court without its addressing the existing law and statute, each unaffected by this Court's action in vacating the judgment; and thus, an obstacle to full declaratory and damage relief.

The D.C. Court of Appeals, however, clearly viewed itself in that capacity; stated nothing about the effect of J.S.R. and the statute on full relief; and thus, in responding to this Court's order vacating its judgment, did so wrongly.

Our Petition should be granted or the prior-granted Petition in No. 80-45 reinstated.

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